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Special Counsel for  
**RICHARD KIPPERMAN, Chapter 7 Trustee**

**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

In re:	)	<b>CASE NO. 99-33191-B7</b>
	)	
<b>SARA NEWSOME BURNS</b> , an individual,	)	<b>ADV. NO. 01-90355-B7</b>
	)	
Debtor.	)	
_____	)	<b>TRUSTEE'S REQUEST FOR JUDICIAL</b>
<b>RICHARD KIPPERMAN</b> , Trustee,	)	<b>NOTICE IN OPPOSITION TO</b>
	)	<b>CREDITOR BRADLEY PROULX'S</b>
	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
Plaintiff,	)	
	)	
v.	)	Date: December 17, 2001
	)	Time: 2:30 p.m.
<b>BRADLEY PROULX</b> , an individual,	)	Dept: 4
	)	Judge: The Honorable Peter W. Bowie
	)	
Defendant.	)	
_____	)	

Plaintiff RICHARD KIPPERMAN (hereinafter the "Trustee"), hereby requests the Court take judicial notice, under Federal Rules of Evidence Rule 201, of the following facts submitted to the Court in opposition to the motion for summary judgment brought by defendant/creditor BRADLEY PROULX.

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Exhibit:                      Description:

"A"                      A true and correct copy of the common, accepted definition of the word "pending" as defined in Black's Law Dictionary, Seventh Edition, page 1154 (1999) ("Black's Law Dictionary").

Black's Law Dictionary defines the word "pending" as: "Remaining undecided; awaiting decision <a pending case>." It is proper for this Court to take judicial notice of the quoted definition of the term "pending" as defined in the well-known and highly-regarded Black's Law Dictionary. *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939, 944 (6<sup>th</sup> Cir. 1993) ("the district court was within its discretion to take judicial notice of the dictionary definition of the word 'arising'"); *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988) (courts may take judicial notice of well-known definitions/facts contained in dictionaries and encyclopedias); *Hancock v. American Steel & Wire Co. of N.J.*, 203 F.2d 737, 740 (Cust. & Pat.App. 1953) ("Courts take judicial notice of the meaning of words. . ."); *New York Life Ins. Co. v. Calhoun*, 97 F.2d 896, 898 (8<sup>th</sup> Cir. 1938) ("it is permissible for the court to take judicial notice of [a word's] meaning as given in standard works such as dictionaries").

Dated: December 16, 2001

**ROBBINS & KEEHN**  
A Professional Corporation

By: /s/ L. Scott Keehn  
L. Scott Keehn  
Leslie F. Keehn  
Special Counsel for  
**RICHARD KIPPERMAN, CHAPTER 7 TRUSTEE**

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**penalty**

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"A *penalty* is a sum which a party ... agrees to pay or forfeit in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security, where the sum is deposited or the covenant to pay is joined in by one or more sureties, to insure that the person injured shall collect his actual damages. Penalties ... are not recoverable or retainable as such by the person in whose favor they are framed ...." Charles T. McCormick, *Handbook on the Law of Damages* § 146, at 600 (1935).

**civil penalty.** A fine assessed for a violation of a statute or regulation <the EPA levied a civil penalty of \$10,000 on the manufacturer for exceeding its pollution limits>.

**statutory penalty.** A penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered.

**penalty clause.** A contractual provision that assesses an excessive monetary charge against a defaulting party. • Penalty clauses are generally unenforceable. — Often shortened to *penalty*. — Also termed *penal clause*. Cf. LIQUIDATED-DAMAGES CLAUSE; LIMITATION-OF-REMEDIES CLAUSE.

"It not infrequently happens that contracts provide for what is to happen in the event of a breach by the parties, or by one of them. Such provisions may be perfectly simple attempts to avoid future disputes, and to quantify the probable amount of any loss. That is unobjectionable. But sometimes clauses of this kind are not designed to quantify the amount of the probable loss, but are designed to terrorize, or frighten, the party into performance. For example, a contract may provide that the promisor is to pay £5 on a certain event, but if he fails to do so, he must then pay £500. Now a clause of that kind is called a penalty clause by lawyers, and for several hundred years it has been the law that such promises cannot be enforced. The standard justification for the law here is that it is unfair and unconscionable to enforce clauses which are designed to act in *terrorem*." P.S. Atiyah, *Promises, Morals, and Law* 57-58 (1981).

**penance.** *Eccles. law.* A punishment assessed by an ecclesiastical court for some spiritual offense.

**pend, vb.** (Of a lawsuit) to be awaiting decision or settlement.

**pendency** (pen-den-see), *n.* The state or condition of being pending or continuing undecided.

**pendens.** See LIS PENDENS.

**pendent** (pen-dent), *adj.* 1. Not yet decided; pending <a pendent action>. 2. Of or relating to pendent jurisdiction or pendent-party juris-

diction <pendent parties>. 3. Contingent; dependent <pendent upon a different claim>.

**pendent-claim jurisdiction.** See *pendent jurisdiction* under JURISDICTION.

**pendente lite** (pen-den-tee li-tee), *adv.* [Latin "while the action is pending"] During the proceeding or litigation; contingent on the outcome of litigation. — Also termed *lite pendente*. Cf. LIS PENDENS.

**pendente lite administration.** See ADMINISTRATION.

**pendent jurisdiction.** See JURISDICTION.

**pendent-party jurisdiction.** See JURISDICTION.

**pending, adj.** Remaining undecided; awaiting decision <a pending case>.

**pending, prep.** 1. Throughout the continuance of; during <in escrow pending arbitration>. 2. While awaiting; until <the injunction was in force pending trial>.

**pending-ordinance doctrine.** The principle that a municipality may properly deny an application for a property use that, although it would satisfy existing law, would violate a law that is pending when the application is made. • This doctrine was judicially created, mainly to short-circuit landowners' attempts to circumvent a new ordinance by applying for a nonconforming use on the eve of its approval.

**penetration pricing.** Pricing of a new product below its anticipated market price to enter a market, discourage competition, and recover the initial investment.

**penitentiary** (pen-a-ten-sha-ree), *n.* A correctional facility or other place of long-term confinement for convicted criminals; PRISON. — **penitentiary, adj.**

**Pennoyer rule** (pa-noy-or). The principle that a court may not issue a personal judgment against a defendant over which it has no personal jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

**Pennsylvania rule.** *Torts.* The principle that a tortfeasor who violates a statute in the process of causing an injury has the burden of showing that the violation did not cause the injury.